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# Supreme Court of The United States

## No. 2, Original.

THE STATE OF NEW MEXICO

vs. In Equity.

THE STATE OF TEXAS

### PETITION FOR REHEARING.

Now comes the said complainant by its Special Counsel, and prays the court for a rehearing on its exceptions to the Special Master's Report and on the decision of the Court sustaining the exceptions of defendant to the Master's Report, on the following grounds:—

First, because the court, as far as can be ascertained from its opinion, has given no attention to the second exception, and especially to so much thereof as sets up that said report incorrectly states at page 26 that there is controversy as to the location of Alamitos; and incorrectly states at pages 42-3 that from January 7 to 18 Clark was occupied in locating an astronomical observatory and ascertaining its latitude and that the results of the observations fixed the latitude of his observatory at 31° 59' 48.23'' and the Special Master conjectured that, as this is 11.8 seconds south of the 32nd parallel, a measurement therefrom of 1,192.53 feet north would reach the Initial point of his survey, when there is not a word in the record to support the statement that the observations resulted in fixing the latitude of an observatory as they really fixed the latitude of the Initial Point at 31° 59' 48.23'' north

latitude, an error shown by a mere inspection of the record; and incorrectly states, at page 48 that it was admitted by Counsel at the hearing before the Master that "occupancy and physical possession by Texas patentees and persons holding under them, of the land in question, its use, cultivation and enjoyment" "is unquestioned" when counsel for complainant have always insisted and still insist that there was no evidence whatever in the record of any such possession of any of the said land; and incorrectly states at page 61 in effect that the Diaz report and survey contained the full survey of the river from the Initial point at 32 degrees 22 minutes down to Frontera, when there is nothing in the record to support that statement, and the alleged record of the Diaz survey shows a survey only from Frontera to Amoles and nothing between Amoles and the said Initial point, it being the fact that each of the foregoing statements criticized in said second exception are of importance in sustaining the findings and conclusion of the Special Master.

Second:— because the Court, as far as can be learned from its opinion, has given no attention to the third exception to said report as conjectural, where the report says that a statement that maps were made from actual survey makes it extremely probable that the river and topography north of the parallel of 31° 47' must have been delineated on Map 29 (Defendants Exhibit No. 6) from the survey made by Charles Radziminski, thus giving the said map No. 29 the support of Radziminski, without any testimony whatever, which must have been of importance to the somewhat irregular mind of the Special Master.

Third, because the Court, as far as can be learned from its opinion, has given no attention to the fifth exception, or the argument relative thereto, which, if well-founded, as I assert that it is, is absolutely destructive of the report as a whole and of the whole case for Defendant.

Fourth, because the Court, as far as can be learned from its opinion, has given no attention to the sixth exception, which sets up that, with regard to the meaning of an entry in Clark's record quoted at page 40 of the report, no attention is given by the Special Master to the authorities cited at pages 7-8 of Part Two of the original Brief for Complainant the meaning of said entry being of great importance as to the location of Clark's monument No. 1.

Fifth, because the Court in its conclusion that Clark's monument No. 1 did not coincide with his station 1, obviously has not considered the testimony on that point, but has merely adopted the master's holding relative thereto without resorting to the the record itself which is convincing that the Master was in error.

Sixth, because the court has not given proper attention to the eighth exception, which sets up that the report recognizes the establishment of Clark's monument No. 1 by the Scott-Cockrell Commission as absolutely correct without any consideration of the undisputed testimony which shows that there was no attempt by that Commission to re-establish Clark's lines except as to monument No. 1, and that its work was grossly inaccurate.

Seventh, because the Court holds that New Mexico is bound by the re-establishment of Clark's Monument No. 1, by the Scott-Cockrell Commission and cannot question its accuracy, although that Commission was authorized only to re-establish the Clark lines, and the holding of the Court would make the work of that Commission equally binding on both States no matter how far it may have departed from the Clark lines, even if it had run an east and west line ten or twenty miles north or south of the 32nd parallel and called it the Clark line.

Eighth, because the Court holds that the ordinary doctrines of accretion and avulsion do not apply to this boundary.

And Complainant submits herewith, in support of its petition, the following memoranda, to make more clear the reasons for this application.

FRANK W. CLANCY,
Special Counsel for New Mexico.

In support of the foregoing petition, I hereby certify that it is presented in good faith and not for delay.

FRANK W. CLANCY,
Special Counsel for New Mexico.

**MEMORANDA IN THE NATURE OF ARGUMENT.**

I will first give attention to what is the most important matter to be considered in connection with the foregoing petition for rehearing, and to which the opinion of the Court gives no attention whatever although it is clearly set forth in my Brief on the exceptions, or at least I have thought that it was there so set forth, but apparently I have been mistaken, as it did not impress the Court as being of any importance whatever. This is humiliating to me, and I will now endeavor briefly to restate my argument, in the hope that I can do so in a manner which will convince the court that it is worthy of careful consideration.

**AS TO THE SO-CALLED SALAZAR-DIAZ SURVEY.**

In the opinion, after considering the work of the Scott-Cockrell Commission, it is said that in support of its contention as to the location of the river, Texas further relied upon various old surveys, patents and maps, and the testimony of its engineers in regard thereto as showing the true course of the river southwardly through the valley from the point where it crossed the parallel, and that these documents consisted mainly of the so-called Salazar-Diaz survey of the Rio Grande made in 1852 by Diaz, a Mexican Engineer, by order of Salazar, the Mexican member of the Joint Commission under the Treaty of Guadalupe Hidalgo; a survey made in 1860 and a resurvey made in 1886, by Texas Surveyors, of a Mexican Grant on

which Texas reissued a patent in 1886; surveys made by Texas surveyors between 1848 and 1873 several of which were bounded on the west by the river bank, on which Texas issued patents between 1860 and 1874; maps of surveys made in 1852-1853 and 1855 under the direction of the American Surveyor for the Joint Boundary Commission under the Treaty of Guadalupe Hidalgo and the American member of the Joint Boundary Commission under the Gadsden Treaty, and agreed to by the Joint Commission, and War Department maps of Surveys made in 1854-1856 in the course of explorations for a railroad route to the Pacific Ocean, and that Texas also relied upon long acquiescence by the United States before the Territory of New Mexico had been admitted as a State.

Without attempting to criticize this statement as might be done successfully as to some details, relatively unimportant, I must call attention to that part of it as to several of the Texas surveys being bounded on the west by the river bank as none of them were so bounded, but many of them were bounded at their southern ends by the river, this being applicable to the surveys in the southern part of the disputed area, and to that part which says that any map was made under the direction of the American surveyor for the Joint Commission under the Treaty of Guadalupe Hidalgo, as no such map can be found in the record which could remotely affect the location of the river above El Paso which is the matter now in dispute. There was a survey made by Charles Radziminski which neither side has been able to find, which might be of importance, but as far as this case is concerned, it is non-existent.

It should be said however, that as to the line found by the Master from its southern end as far north as Amoles, and adopted by the Court, there is absolutely no foundation except upon the so-called Salazar-Diaz survey, which purports to have been made in 1852 by Diaz under the direction of Salazar who was then the Surveyor for Mexico as a part of the Joint Commission under the Treaty of Guadalupe Hidalgo. The Texas experts, Campbell and

Owen, have attempted to retrace the Salazar-Diaz Survey, according to what purports to be its record, from a point undoubtedly on the Rio Grande, near the site of the old astronomical observatory of Frontera, the location of which is not in dispute in this case (see pages 70-71 of Part II of Complainants Original Brief) but the Salazar-Diaz Record locates it about 250 feet away from its true position, although it was established by Major Emory in April, 1852, and the Diaz work purports to have been done in August of the same year, which must have been before the signs of Emory's work could have disappeared. (see also Complainants Brief on the Exceptions at pages 78-79 thereof.) The conclusion must be that Diaz was never on the ground near Frontera in August, 1852, or he could not have made such a mistake, especially as we have not been able to find anything wrong about his work between San Ignacio and El Paso, a distance of about 40 miles as the Texas expert, Campbell, states, on page 2779 of the record, occupying about four months, while between El Paso, and Amoles a distance of about 20 miles as Campbell states, the alleged record shows that it took him only nine days, which is incredible. John H. Clark in 1859 had no difficulty in relocating Emory's observatory, nor have the engineers for both complainant and defendant in the present case.

Campbell and Owen have located the Diaz River according to his alleged record, along an east and west course across the valley, and I have no reason to suppose that they did not do so correctly, and then attempted to locate a series of Texas surveys numbered from 154 to 262 as bounded at their southern ends by that river, as shown on Defendant's Exhibits 62 and 65, but their attempt was not successful as it would throw the river lines of the western ones out on the hills where no river ever could have run, as is in effect testified by Post at pages 2874-5 of the record, by Turley at page 2128, without contradiction and substantially admitted by Campbell himself at pages 2537-8.

As to these Texas surveys they are all put in evidence by

Texas and when closely examined, are absolutely destructive of the east and west Diaz river as shown on Defendant's Exhibits 62 and 65, and, in the addendum to our Brief on the Exceptions, are shown exact copies of the plats thereof, with references to the pages of the record where they are to be found, and they show the course of the river to be from the northwest to the southeast instead of from west to east as the Diaz river runs. This absolutely destroys the validity of the pretended Diaz record, by evidence introduced by Texas itself, and without that record, Texas has nothing to support its claim as to the location of the river of 1850, except the impossible Canutillo survey. Moreover, the little plats of those surveys, beginning with No. 3, made in 1854, in which the observatory of Frontera was located, show a river not far from and nearly identical with, the river claimed by complainant. And yet I have been so unfortunate in my presentation of this decisive piece of evidence, as to fail in attracting the attention of the Court, although I thought I had made it clear in both my Brief and in the oral argument. I call attention to the fact that neither by brief nor in the oral argument, has Texas attempted to meet this presentation, and I must assume that it was impossible to answer it. Our attractive young friend, Dan Moody, in his argument, devoted himself entirely to answering my associate Mr. Hardie, who spoke only as to the question of accretion in the region of the Country Club.

In addition, I call attention to the uncontradicted evidence, referred to on pages 80 and 81 of Complainants Brief on the Exceptions to the effect that in the Cañon below Frontera, at one place the Diaz line falls so close to the hills on the east side of the valley that there is not room for a river between that line, which represents the west bank of the River, and the foothills on the east, and that at another place, on the west side of the river, the Diaz line ascends the sides of the rocky hills 70 to 80 feet above the river, passing as much as 300 feet back from where the river could run, and that below the international boundary line the Diaz line passes a con-

siderable distance back upon the foothills where there is no appearance that the river ran at any time. When we take into consideration the fact that a careful examination of the Diaz record of his work on the 40 mile stretch between San Ignacio and El Paso, reveals no fault, and we looked carefully for it, it seems impossible that he could have done any thing so bad as his alleged record discloses in the work above El Paso, which shows it to be fictitious

All of this was urged upon the Master, but he held, and the Court follows him in holding, that the Diaz survey and the alleged record thereof, are conclusive as to the location of the river of 1850. Our contention as to the location of the river, is immensely strengthened by the early Texas surveys, beginning with No. 3 as shown in our addendum to the Brief on the exceptions, and I submit that the judgment of the Court ought to provide for a delineation on the ground, as the boundary, of what is shown by those surveys made by Texas and put in evidence by Texas, beginning with No. 3 at the southern end, which has a safe beginning location with the Frontera observatory, which is in it.

The only survey in evidence except the fictitious Diaz record, which tends in any degree to support the Texas claim is that of the Canutillo Grant, and I submit that, for reasons set forth in Complainants Brief on the Exceptions, at pages 62 to 67, which do not seem to have attracted the attention of the Court, the said survey is without any foundation in the grant itself, and ought to be carefully considered by the Court, and rejected, as was urged upon the Master, the argument in our Brief on the Exceptions being a reproduction of what appears at pages 61 to 63 of Part II of our original Brief, which was before the Master and urged upon his attention and which will not, in the interest of brevity, be here repeated, but I beg the Court to give attention to the same, as it demonstrates the worthless character of the survey, beyond all doubt, Moreover; that survey and the Diaz line do not agree.

## AS TO THE LOCATION OF ALAMITOS.

In the first ground for this petition, reference is made to a statement by the Special Master that there is controversy as to the location of Alamitos. Now, Alamitos was a well-known stopping place for travelers as a camping ground close to which the river ran in very early days, and about which a large number of witnesses for New Mexico, and none for Texas, testified and was an important land mark by which to fix the course of the river and no indication can be found in the record of anything like a controversy as to its location, and the report of the Master does not point out anything to show such controversy, or any substantial difference in the testimony as to its location. His statement was a gratuitous attempt to cast some discredit upon an important point as to the location of the river without the slightest foundation for so doing.

## AS TO THE MASTER'S FICTION CONCERNING AN OBSERVATORY

In the first ground for the present petition and in the second exception, attention is called to the Master's statement at pages 42-3 of his report that from January 7 to 18, Clark was occupied in locating an astronomical observatory and ascertaining its latitude, and that, as a result, he fixed the latitude of his observatory at 31° 59' 48.23''. There is not a word of truth in that statement. On Clark's Map No. 1, directly south of the Initial Point of his survey, is a mark indicating an observatory, and Mr. Warren through some mysterious aberration of mind, evidently thought a determination of the latitude of that observatory, would assist in determining the Initial Point of Clark's survey. No one can account for that delusion, if it were a delusion. All that we have in the way of a record of Clark's survey is contained in Senate Executive Document No. 70 of the 47th Congress the whole which has been put in evidence, and Mr. Warren at page 42 of his report, in a foot note gives a reference to pages 144-151 of that Senate Document in support of his statement. I have a copy of that document before me as I write, and at page 144, referred to by Mr. Warren, begins what is headed

"Complete Record of Astronomical Work," and under a subheading showing that the tabulation which follows, is of the "Latitude and longitude of astronomical stations on Texas Boundary Line," the first station mentioned of "Determinations, 32nd parallel", is "Initial Point" with a latitude of 31° 59' 48.2'' and on page 151, there is a line which reads "Latitude of Astronomical station No. 1, initial point, 32nd parallel on Rio Grande 31° 59' 48.23". Now Mr. Warren can read, and must have read those things in order to give reference to the pages, and yet he says the observations were for the purpose of ascertaining the latitude of an observatory. The obvious effect of Mr. Warren's misstatement, if not detected, would be to discredit New Mexico's location of Clark's Monument No. 1, which he states, at page 301 of said Senate Document No. 70, was at his "Initial Point", and this would be an advantage to Mr. Warren's side of the case, and the location of Monument No. 1, is most important, New Mexico locates Clark's Monument No. 1, at Station 1, its location of that station being admitted by the Chief expert for Texas, Campbell, to be correct, at page 2454 of the record, as well as the correctness of the New Mexico locations of stations 2, 3 and 4 and of monuments at 2 and 3, but not at station 1 or 4.

It may be well here to say that New Mexico's experts not only relocated stations 2 and 3 and their monuments as admitted by Campbell, but also found the remains of a monument at station 4. They also found a Scott-Cockrell monument at station 3, which is the one that commission took to be monument 4.

The substance of the objection to Warren's statement about observations as to establishing the latitude of an observatory, is set out at page 21 of our Brief on the Exceptions, and has never been answered, nor has the Court given it any attention, although it is important to the location of Clark's Monument No. 1.

## AS TO RADZIMINSKI.

In the second ground for this petition, I call attention to the fact that the Court has given no attention to the third exception to the report as conjectural where it says that a statement that maps were made from actual survey makes it extremely probable that the river and topography north of the parallel of 31° 47' must have been delineated on Map 29 (Defendant's Exhibit No. 6.) from the survey made by Charles Radziminski.

Now the survey by Radziminski cannot be found and about all we learn of it from the record (page 2251) is that it was a survey of the river from Frontera, (not from parallel of 31° 47') to 32° 22', under orders of Major Emory, and long before there could have been any consideration given to the parallel of 31° 47' which became of importance only after the Gadsden Treaty in December, 853. It appears that Radziminski was principal assistant, and must have been a man of value as he continued with Emory in his work under the Gadsden Treaty (Record page 2278). Mr. Warren's attempt to add the weight of Radziminski to the support of a map with which he had nothing to do, is inexcusable, and the exception ought to have been sustained.

Thus far these memoranda have been devoted to a discussion of the so-called Salazar-Diaz survey, which is the subject of the fifth exception mentioned in the third ground of this petition. A comparison of Defendant's Exhibit 62 with what is shown on the addendum to my Brief on the Exceptions which reproduced plats of the old surveys and shows the course of the river, will be of assistance in making clear my contention that those surveys, cannot be harmonized with the course of the river as set up by the Special Master and followed by the Court without any consideration of this important evidence, probably from too great confidence in the Master, who clearly did not consider it himself.

I subjoin a tabulated statement as to surveys appearing ~~in~~ on

said Exhibit 62 showing their numbers, the pages of the record where they appear, when made, and the varas in width from east to west, as nearly as possible from what appears in the surveys, which may be of value as showing their impossibility because, as the Court has said in its opinion, "The Valley is about four miles wide at the northern end and narrows gradually to a canyon or gorge at the Southern end," and there would be no such impossibility if platted to the river claimed by New Mexico, as they ought to be:

| Nos. | Page of Record | When made | Varas in width |
|---|---|---|---|
| 174 | 3330 | 1860 | 672 |
| 154 | 3327 | 1859 | 672 |
| 155 | 3323 | 1873 | 1020 |
| 158 | 3316-7 | 1860 | 650 |
| 156 | 3313-4 | 1859 | 1000 |
| 157 | 3310 | 1873 | 1020 |
| 259 | 3306 | 1871 | 950.4 |
| 260 | 3303 | 1871 | 950.4 |
| 261 | 3299 | 1871 | 950.4 |
| 262 | 3295-6 | 1871 | 546.5 |
| | | | 8436.7 |

A vara may be safely computed at 33 inches.

I call special attention to survey No. 157, which appears on page 3310 of the record, and to the fact that these surveys constituted a series, each tied to the preceding one, and No. 157 shows that it must be on the east, or north east side of the river, as a stake referred to in the survey, is said to be "immediately opposite E. end of a high bluff on the New Mexico side of the river known as Santa Teresa," the line running "thence due North 4134 varas to a large stone near the foothills at what is known as the "Durasneeta," that being the Texas spelling of Duraznito, the name of a place which seems to have been well known in early days, and about which testimony was given by several old witnesses, who

located it on the east side of the river of their early life and it was so called because there was there, or had been a small peach tree, durazno meaning a peach, and duraznito being a diminutive thereof. I believe it is marked on a map made by Charles Post which is filed as Exhibit C with the complaint. This series of surveys must have been all on the same side of the river, and continuous as they are, show a river entirely different from the Diaz river, and quite close to what we claim as the location of the river of 1850. See blue print at end hereof which shows part of Defendant's Exhibit 62

### THIRD GROUND FOR THE PETITION.

As to this ground, I believe it is sufficiently considered under the first division of these memoranda.

### AS TO THE SCOTT-COCKRELL COMMISSION AND THE LOCATION OF CLARK'S MONUMENT NO. 1.

I cannot undertake to instruct this Court as to matters of law, but I ought to be able to give information as to the facts of the case with which I have struggled for nearly fifteen years, a consideration of which may have some influence as to conclusions of law, especially as to the effect of the work of the Scott-Cockrell Commission, as to which the Court in its opinion, says that New Mexico is bound by the re-establishment of the monument by the Commission, meaning Clark's Monument No. 1, and cannot question its accuracy. I cannot understand how the Court reaches that conclusion, but that may be due to my lack of intelligence. The gifted Georgia authoress, Augusta Evans, whose novels were received with great popularity, is reported to have said, in substance, in response to critics who said her books were not intelligible, that it was all she could do to write the books without furnishing brains to critics to understand them, and this may be applicable to the present matter, and my lack of brains

It may reasonably be urged that by the resolution of Congress approved February 16, 1911, New Mexico may be held to be bound by

the Clark lines, notoriously inaccurate as they were, as its boundary, but I cannot understand that Congress did more than that although it did provide for the re-establishment of those lines on the earth's surface, and the Scott-Cockrell Commission was created for that purpose, but if that Commission did not re-establish the Clark lines is its work of any validity? As suggested in the seventh ground for this petition, the holding of the Court would make the result of the work of the Commission equally binding on both States if it had made no effort to find the Clark lines. Not less reprehensible, in principle, is their absolute failure to do what the resolution of Congress required. As far as we have any record of the Clark lines, it is to be found in Senate Executive Document No. 70 of the 47th Congress, and it shows that Clark, as he states at page 306 thereof, had the boundary line constantly referred by triangulation to prominent physical objects which can be easily identified, and which will never in all human probability be obliterated by natural and other causes. "It is obvious that the natural and proper course for the reestablishment of his line, would be by reproducing the references by triangulation to prominent physical objects," but the Scott-Cockrell Commission never in a single instance reproduced those references" "by triangulation to prominent physical objects," but Post, Steen and Turley, experts for New Mexico, had no difficulty in making such reproductions as to all stations on Clark's 32nd parallel work which can affect this controversy, which are his stations 1, 2, 3, 4, and 8, at the last of which, his Monument No. 5, was found as described by him at pages 301-2 of said Senate Document No. 70. Each of these was identified by Clark's bearings on mountain peaks beyond any possibility of doubt, so that Campbell, at page 2454 of the record agreed as to their correctness and as to there being monuments at stations 2 and 3 but not at stations 1 and 4. It may be well here to say that New Mexico experts not only relocated stations 2 and 3 with monuments as admitted by Campbell, but also found the remains of a monument at station 4, and they also find a Scott-Cockrell monument

at station 3, as described in the Commissions record at pages 3168-9 of the record which the Commission called Monument No. 4. The failure of that Commission to make any relocation of Clark's line by the method which he himself pointed out and which was successfully adopted by Post, Steen and Turley, and later by Campbell and Owen, in effect was an absolute abandonment of the work of re-establishment of Clark's lines, as the only available practical method was the one specified by Clark himself as hereinbefore quoted, and is indicated by the record of his work.

The approval by the President of the work of that Commission adds nothing to its validity, as the resolution of Congress does not provide for any report to, or approval by, him. In support of my contention as to the proper view to be taken about the accuracy and validity of the Scott-Cockrell record and of its approval by the President, I will make a quotation from a letter dated July 15, 1853, from W. L. Marcy, then Secretary of State, to Mr. James Gadsden, in which he was considering the procedure of the Joint Commission under the Treaty of Guadalupe Hidalgo, and where he uses the word "treaty" if we substitute "resolution by Congress" what he says is applicable to this matter. He was one of our great statesmen and his opinion is worthy of, respect.

That which I quote will be found on pages 3191 and 3192 of the record, and is as follows:—

"By recurring to the treaty, it will be perceived that the Executive Department of the respective governments had no control over the conduct of the Commission and Surveyor appointed by them, nor was there reserved to either one the duty or the right to approve of their proceedings, and no approval or sanction by either or both is required to give them validity. The boundary Commission was placed beyond the power of either Mexico or the United States, while acting in good faith in the matter committed to them by the Treaty. Their decisions when made conformably

thereto, were valid and effective to bind the two governments without the approval of the executive department of either, and when not in conformity to the Treaty, such approval would give them no validity. Whatever may have been the opinion of the Secretary of the Interior, or any other secretary, or of even the President, upon the acts of the American Commissioner, those acts are not now the less open to question as to their binding effect on the United States. Such approval no more corrects an error, if error there be, than a like Executive approval would correct an error committed by any judicial tribunal of the United States. If indeed there had been an explicit approval by the late executive officers of the decision of the American Commissioner on the Initial Point, inasmuch as that decision was not made by competent authority and was not a matter at all depending upon executive sanction, the President is in no way released from his duty of seeing that the boundary line has been run and marked by those who were selected for that purpose and he cannot without disregarding that duty, acquiesce in a line which has not been thus established."

"If the boundary Commission had established in the manner prescribed by the Treaty a line so variant from one intended by the parties it can hardly be supposed that the party which had thus obtained an accidental advantage would insist upon holding on to it, but the question is not presented in that respect for the line in question, as I have shown, has not been run and marked in the mode required by the Treaty."

Now to make Mr. Marcy's views applicable, we are led to examine the resolution of Congress to ascertain the manner prescribed, if any, in which the Commission authorized thereby was to run the line for the boundary we are now considering, as that is the only authority for the work. The resolution states that the Commission thereby contemplated, shall, as to the 32nd parallel part of the line, run from the point marked by said Clark as the southeast corner of New Mexico, west with the 32nd degree of

north latitude as determined by said Clark, to the Rio Grande. It does not say how the line as determined by Clark is to be ascertained, but it is obvious the only possible method is by Clark's record of what he did, which as far as we can learn is to be found only in the Senate Document No. 70 already referred to. Clearly the Commission must ascertain the line determined by Clark, and must do it from Clark's record. If they attempted to do it in any other way, their work would be of no validity according to Mr. Marcy's views. There is presented in the record, at pages 3154 to 3180 a copy of so much of the Scott-Cockrell record running westward from the 198th mile to the end, which covers all of the line material to our discussion, and there is not to be found in it a word to show the identification of anything of Clark's survey by the method indicated by him, of bearings on physical objects, but on the contrary it proceeds as an independent, original survey without any regard to Clark's line, and indeed, as to Clark's station 8, at which is his monument 5, the Scott-Cockrell line is 157.4 feet north thereof as is shown by the uncontradicted testimony of Turley at pages 2122 and 2169-70 of the record. Here is evidence that the Scott-Cockrell Commission were not re-establishing Clark's line as was their duty. Post, Steen and Turley had no difficulty in locating station 8 by bearings on Mountain Peaks, and there found monument 5, a large slab of stone with inscriptions "on the road leading from El Paso, to the Salt Lakes" as Clark described it.

There can be no doubt that the work of the Scott-Cockrell Commission shows no sign of an attempt to re-establish Clark's lines, as required by Congress, until they came to the end, when they sought to find his Monument No. 1, by an absurd and ridiculous method. By some accident they stumbled on a Clark monument, at Clark's station 3, where Clark's record called for a monument, and that station is correctly located by our experts as is admitted by the principal expert for Texas at page 2454 of the record, and the Scott-Cockrell surveyors state that their accidental discovery was "in proper position for monument No. 4, according to the topogra-

phical sketch of Clarks" page 3168 of record. They do not found this conclusion upon Clarks description of his No. 4, "On the first spur of the Franklin Mountains cut by line is of stone and white-washed six feet high." They probably never looked at that which is the only Clark guide to its location, except the bearings on mountain peaks at station 3 and station 4. This is only another evidence of their utter disregard of Clark's record of his line, which it was their duty to establish.

Now Clark's map No. 1, which they appropriately call a topographical sketch" (page 3168 of the record) evidence as to which shows it to be erroneous in many particulars, is adopted by them as the basis, and the only basis for their location of Clark's monument No. 1, because on that sketch they attempt to scale to the west from their erroneous No. 4, on an approximate scale of 201.4234 chains per inch (page 3179 of the record) or 13,293.944 feet to the inch, the only method of determining that approximate scale being that indicated by Post at page 1931 of the record and described by him at pages 1947-8, and this must have been the method adopted by the Scott-Cockrell surveyors, as he adopted for use a scale of 13,100 feet or only about 194 feet to the inch less than that of the Scott-Cockrell survey which would not make much difference. He further testifies at page 1944 that scaling back to the west from monument No. 2, on the first sand Ridge, the location at which of Monument No. 2, must be considered as established (see page 2454 of the record) Monument No. 1, corresponds to Station No. 1, where we contend Monument No. 1 is located.

The last entry in the Scott-Cockrell record at page 3179 of the record, says. "The land at this point as well as that between here and the 209.66 mile point is not over two years old," which corroborates our contention repeatedly made, that the Scott-Cockrell location of the initial monument of a great survey, is in the middle of an alluvial basin where the floods of which much testi-

mony has been given would destroy any monument which could be built, while station 1 where we claim Monument 1 to have been, is on a bench many feet above the valley of the river. No engineer, especially one of Clark's experience and ability, would ever have made such a location for his beginning point, without any record of bearings to determine its location, as in the case of his station, while placing Monument No. 1, at station No. 1, would be free from such objections, and would be the natural place for his beginning point, at a safe place from floods.

Mr. Warren disposes of this matter as follows:—

"I consider that the plaintiff's theory as to the coincidence of the location of Monument No. 1, with Station 1, is without basis." He gives no attention to the testimony on this subject, as he does about others matters, and I must conclude that he found he could make no statement of it which would justify his conclusion.

Station No. 1, was the beginning of Clark's survey, and the natural place for his first monument which he says was 600 feet from the river, and Mr. Post after locating Station 1 from the bearings given by Clark in his record, found that it was close to 600 feet from the river previously pointed out to him by old men, and there is no other place in his record by which the location of that monument can be fixed. Monuments so far as we have found them are at stations although the record of stations seldom discloses the fact, but monument 2 is found at station 2. This must be monument 2 because both sides locate Monument 1 west of this, and no other monument to the west. The record of station 3 calls for a monument (page 19 of Senate Doc.) and this being the next beyond station 2, must be monument 3. At station 4, identified unmistakably by bearings on the mountains, the remains of a monument are found, and at station 8, monument 5 is found and identified, although not called for by the record of

station 8, which, however, says "Station 8, on E side of Salt Lake road," which corresponds with the statement at pages 301-2 of the Senate Document No. 70. By some error of the printer, it is necessary to turn back from page 20 which ends with part of station 5, to page 11, where is found the remainder of station 5, followed by station 6. It will be seen that monuments are always at stations although the record of bearings from stations do not always call for the monuments. Campbell says that he has known Clark's monument No. 5, for twenty five years (page 2548 of record) but the Scott-Cockrell Commission did not find it but ran its line a fraction over 157 feet north of it. In connection herewith, I beg the Court to read from my Brief on the Exceptions, beginning near the middle of page 39 and continuing for a few pages.

And yet Mr. Warren says that Plaintiffs contention "is without basis."

While I have shown that there is certainly some basis for it, yet there is something else in the record, adding to the basis. Clark's entries at the foot of page 10 of Senate Document No. 70 are as follows as printed.

Survey on parallel 32° 00' 00''

January 26th. Angles read E. by S.

Station 1

From Mon. to st. 1 measured (2) 55ch. 33ft.; n. base line 00 00 00

Defendant contends that this means a Measurement from a Monument somewhere west of station 1, but this ignores any meaning for N. base line, which, in many other places in Clark's record, clearly means north end of base line, and New Mexico contends that "mon. to St. 1" means a monument at Station 1, and that the measurement therefrom is to the north end of base line. The expert

Post (pages 1934 to 1936 of record) testifies that the word "to" means the connection between the monument and station 1, and shows that the monument was at station 1, and that it is common to speak of a monument "to," "at," or, "for" a staiton. This interchange of these words is in common use not only among those in the profession of surveying and engineering but by literary persons, and authorities, lexicographical and otherwise, are cited at pages 7 and 8 of the Part II of complainants original Brief which was before the special master, as were all other briefs which had been filed and were urged upon his attention and yet he paid no attention to them. There was no contradiction of Post's testimony, as there might have been if he were not correct, and his testimony and the authorities cited are quite convincing that "to" may mean "at" or "for", and the Court is asked to examine them.

Further it is shown by Post, at page 1786 of this record, by Steen at page 2057, and by Turley at page 2147, that by actual measurement on the ground the distance between Station 1, and the north end of the base line was 50 chains, 33 feet and that the entry as printed should be changed from 55 ch. to 50 chs. as one of the numerous errors in the printed record of Clark's work, many of which are pointed out by Turley at pages 2114 to 2116 of the record. This fact of actual measurement being 50 chains 33 feet, not only corrects the error of 55 chains in the printed record, but supports the construction of "to" as meaning "at" and is strong evidence that the monument was at station 1, and cannot be a mere accidental coincidence.

The accuracy and correctness of Post's location of Station 1 and of the base line is admitted by Campbell at page 2454, and the actual measurement on the ground, clearly elucidates the meaning of the entry in Clark's record, and goes far to fixing a monument at Station 1, which must have been Clark's monument No. 1, and yet Warren says our contention as to the location of Monument No. 1, is without basis.

And he adds to that that plaintiff's theory that the Scott-Cockrell Commission measured by mistake from Clark's Monument No. 3, instead of from Clark's Monument No. 4 is also without basis, but I believe that has been sufficiently hereinbefore considered and a substantial and uncontradicted basis clearly shown.

**AS TO THE ACQUIESCENCE OF THE UNITED STATES IN THE LOCATION OF THE RIO GRANDE AS NOW CLAIMED BY TEXAS.**

The only approach to evidence of such aquiescence is to be found in the Canutillo Grant survey, which I have shown, in our original Brief, and in the Brief on the Exceptions, to be without any foundation whatever, so that its existence affords little or no support to the claim of such aquiescence, and as to the numerous Texas surveys which defendant seeks to tie to the Salazar-Diaz river, none of them conflict with the location of the river, claimed by New Mexico, but support that claim.

## SUMMARY

I believe I have shown by reference to the uncontradicted evidence of the so-called Salazar-Diaz survey that it runs its line high above where the river ever could have run in more than one place in the cañon above El Paso; and have shown its lack of conformity to, or harmony with, a large number of early Texas surveys made long before the present controversy began, which fix the location of the Rio Grande in a course, for a long distance in a place entirely different from the Diaz survey, which is destructive of that survey and leads to the conclusion that it must have been fabricated at a period long after those early surveys were made, thus destroying the principal support for Mr. Warren's report, as that there should be a rehearing on this vital matter.

Except as to its absurd attempt to locate Clark's Monument No. 1, the record of the Scott-Cockrell Commission shows no evidence whatever of any attempt at the re-establishment of Clark's lines, which was all that it was authorized to do by the Resolution

of Congress under which it was created, and should be disregarded, as of no effect, and there should be a rehearing as to the effect and validity of the work of that Commission

There is such strong evidence in support of the theory of plaintiff as to the coincidence of Clark's Monument No. 1, with his station 1, and in support of its theory that the Scott-Cockrell Commission measured by mistake from Clark's Monument No. 3, instead of Clark's Monument No. 4, as to which the Master holds, and the Court follows him that there is no basis for plaintiffs contentions as to require a rehearing on those two important matters as the Special Master appears not to have considered that evidence nor has the Court which simply adopts the findings of the Master.

There is such lack of evidence of any acquiescence by the United States in the claim of Texas as now made, to require a re-hearing on that question.

There has been such disregard by the Master, and by the Court following the Master, of several matters specified in the first ground for the petition as to require a re-hearing.

There has been such disregard by the Court fully to consider the matter referred to in the eighth ground for this petition, as to require a re-hearing thereon.

The Court has given little or no attention to the second exception to the report or the matters therein contained as set out in the first ground for the petition, and therefore there should be a re-hearing thereon.

The Court has given no attention to the sixth exception to the report or to the authorities cited thereto as to the same, and therefore the re-hearing should be granted, which is vital and a rehearing should be granted thereon.

The Court has given no attention to the obvious failure of the Scott-Cockrell Commission to re-establish the Clark's line, or to attempt to do so, and to the effect thereby upon the validity of its work, and therefore the re-hearing should be granted.

In order to make intelligible what follows, it should be stated that the foregoing has been prepared by the Special Counsel for New Mexico while that which follows is the work of his associate, Mr. Thornton Hardie in which the Special Counsel heartily concurs, as it presents a well founded view of facts and law which has not been considered by the Court, but is to be considered only in the improbable event that the Court adheres to its decision as to the location of the river of 1850.

The two worked independently, over 200 miles apart.

This Honorable Court, in holding that the ordinary doctrines of accretion and avulsion do not apply to this boundary line, has created an extremely confusing situation with reference to land titles both in the State of Texas and in the State of New Mexico. Land which has been surveyed under the authority of the State of Texas and patented under the authority of that State, and which may have been occupied by persons claiming under that for more than forty years, has now by the decision of this Court been placed within the boundaries of the State of New Mexico. The same applies to persons claiming under surveys and patents issued by the United States to lands supposedly in New Mexico.

If this Court permits the statement contained in its opinion, to the effect that since 1850 the boundary between New Mexico and Texas has been one not subject to the rules of accretion and avulsion to stand, this will be binding upon all private land owners, as they hold in privity to and their rights are represented in this suit by their respective States. This holding will be conclusive in private litigation, regardless of what the true and real facts may have been.

All lands lying in the disputed area have in fact been heretofore patented either by the State of Texas or by the United States. Now, by virtue of the decision of this Court, there will be land in Texas which has never been patented by Texas, and land in New Mexico which has never been patented by the United States or by the State of New Mexico. Lands upon which taxes have heretofore been always paid in Texas will now be re-assessed for taxes, penalties and interest in New Mexico, and lands which have always paid taxes to New Mexico will be re-assessed for taxes, penalties and interest in Texas. Lands which under this Court's decision as to the river of 1850 were rightfully patented by Texas, and which have been highly improved by persons claiming under such patents, will now be public lands in New Mexico; and other lands which were highly improved by persons claiming under New Mexico, at a time when such lands were beyond question in New Mexico, will now become public lands of the State of Texas. We are certain that this Court has contemplated no such result.

The opinion of this Court, upon this issue, finds its principal basis in the statement that the United States and the State of Texas from 1850 to 1912 at all times recognized that the position of the river in 1850 was the boundary, and that the United States and the State of Texas since 1850, in making surveys and granting Patents, always recognized the boundary as the position occupied by the Rio Grande in the year 1850.

This finding and statement of the Supreme Court has no foundation in fact whatsoever, is in direct conflict with the evidence offered by the State of Texas during the trial of the case, and of the maps which were introduced in evidence by the State of Texas as showing the location of the different surveys and patents made under the authority of the State of Texas. There are no surveys in the record which were made by the United States while New Mexico was a Territory which would serve as a foundation for the finding by the Supreme Court upon this issue.

This Honorable Court has undoubtedly been led into this mistake by the statements contained in the exceptions of the State of Texas to the Master's Report, and by the remarks made by the Attorney General of the State of Texas in his argument before this Court

That these statements are not in accordance with the actual facts can be readily seen by this Court by an examination of the "Defendant's Exhibit No. 62", which is a map prepared for the State of Texas by J. L. Campbell, and introduced in this case on the 27th day of November, 1914. It will be noticed that the Salazar-Diaz River of 1852 on that map is designated by a heavy black line. It will also be noticed that the river line of the Texas surveys, being the boundary line of the Texas surveys as surveyed and patented by the State of Texas from 1849 to 1871, is designated on the Campbell map by a thin black line, which is shown on said map as crossing and recrossing the Diaz River Line at many points throughout this territory, thus showing that Texas, in surveying its lands and issuing its patents from 1849 to 1871, paid no attention to the position that might have been occupied by the river in 1850, but surveyed at each date up to the river as it was actually running at the time of the making of the survey. In other words, Texas in making these surveys followed the river as it moved west by accretion, and stopped at the river as it may have moved east by accretion. This same situation is also conclusively shown by an examination of "Defendant's Exhibit No. 65", which was a map prepared by R. J. Owen in 1914 and introduced at that time as evidence in this case by the State of Texas.

In Volume 6 of the Transcript of the Record in this case, beginning at page 3222 of the printed record, and extending down to page 3223 of the printed record, and consisting of pages 5485 to 5525, red numbers, appear photographic copies and maps showing these Texas surveys, all of which were surveyed up to the river as it was running at the time the surveys were made. We call

particular attention to Survey No. 173, known as El Canutillo Survey. This land was originally surveyed August 9, 1860, and the lines were run to the river as it was then flowing. (See red pages 5503 and 5504). This land was re-surveyed under authority from the State of Texas in August, 1886, and no attention was then paid to where the river might have been in 1850.

On the map prepared by R. J. Owen, September and October, 1923, and known as "Plaintiff's Exhibit No. 280", as shown in the supplementary record of testimony taken on Motion of New Mexico in 1924, there is a very clear showing of the location of the west boundary of the Canutillo Grant, as compared with the location of the Diaz-Salazar River Line of 1852. By glancing at that map and that part just to the northwest of the title of the map, it is seen that by the decision of this Honorable Court a tract of approximately 400 acres which lies within the Canutillo Grant, and which was patented by the State of Texas, is placed by the decision of this Court in the State of New Mexico. Of course this 400 acres, having a present value of approximately $100,000.00 may be now divided up, and owned by numerous individuals, constituting in some instances the life savings of such persons, and yet by the decision of this Court all of said 400 acres is placed in the State of New Mexico. The same situation, with variations in the area of the different tracts, exists along the entire length of this disputed boundary.

The United States, while New Mexico was a Territory, and as late as 1905, recognized the doctrines of accretion and avulsion as affecting this boundary. This is shown by "New Mexico Lands Surveyed," consisting of a reproduced plat of a New Mexico survey of sectionized lands, which survey was made in 1905 and is reproduced at the bottom and on the south end of "Map No. 3, Texas", "Defendant's Exhibit No. 65." This is a map prepared by R. J. Owen at the original taking of testimony, and it shows that the New Mexico Land Office, in sectionizing this land, surveyed up to the

river as it was actually running in 1905. No attention was then paid by the United States to the location of any river of 1850.

In all of the surveys made by the United States while New Mexico was a Territory, and in all of the surveys made by the State of Texas up to the date of the trial of this case, no attention was paid to the location of the river in 1850. Fixing the boundary without regard to accretion and division. The record of the testimony in this case conclusively shows further that the field notes and surveys purporting to show the location of the river in 1850 were with difficulty discovered by surveyors for the State of New Mexico, and the State of Texas, about the time of the taking of testimony in this present case. Certainly, if Texas and the United States had been using the river of 1850 as a basis for issuing patents, it would have been familiar to Texas and New Mexico surveyors long before this suit was instituted.

We know that it cannot fail to be sufficiently clear to this Court that the statements which were made in the "Exceptions of the State of Texas," filed just before the submission of this case in the Supreme Court, had no basis in fact, and that the Opinion of this Court is a result solely of a mistake on the part of this Court in accepting the statements urged on submission of this case by the attorneys for the State of Texas.

As a result of this mistake the State of New Mexico will in the aggregate get title under the judgment of this Court to slightly more land than it would have gotten had this Court approved the decision of the Master upon this issue; but there are numerous private owners claiming title under grants from the United States of America who will by the judgment of this Court be deprived of lands which they would have held under the Master's decision, and to which certainly they had good title at the time the lands were granted to their predecessors in title by the United States Government. On the other hand, there are a great number of other indi-

viduals who under the holding of this Court as to the location of the 1850 river, acquired good title to lands patented by the State of Texas, which lands were actually in the State of Texas when the lands were patented, and which may have been occupied by persons claiming under patents from the State of Texas, and over which the State of Texas may have exercised its jurisdiction for more than seventy-five years, which lands, under the opinion of this Court, will now be placed in the State of New Mexico, and these individual land owners will find their Texas titles of no avail to them under the opinion of this Court.

Another result which certainly is not contemplated by this Court is that there will be numerous tracts on both sides of the boundary as determined by this Court, which will now be public lands in the States in which such tracts are placed by the decision of this Court.

We shall not further prolong the discussion of the many and various complications which will arise from the judgment of this Court in the matter now under discussion. We have only hinted at a few such complications, and call attention to the fact that as late as 1924, when Texas filed its main brief in this suit, the State of Texas, through its Attorney General, recognized as applicable to this boundary the ordinary doctrines of accretion and avulsion. (We refer to next to the last paragraph on page 11 of Part 1 of the Brief of the State of Texas, and also to the last clause of the last paragraph on page 12, Part 1 of said Brief.)

We say further that even should this Court be unwilling to change its holding to the effect that the boundary should be in the position occupied by the Rio Grande in 1850, then, nevertheless it should correct the statement to the effect that since 1850, and up to 1912, the United States and Texas recognized the river boundary as fixed in the position occupied by it in 1850, without regard to questions of accretion.

As this Court can readily see, it makes a tremendous difference to private land owners whether the decision is based upon a holding that the United States and Texas, since 1850, recognized the boundary line as one not affected by accretion, or is based upon the adoption by New Mexico of its Constitution, with the description of the boundary as therein set out.

A private land owner who had acquired a good title from the United States to land in the Territory of New Mexico would be protected in his private title, even though by the Constitution of New Mexico such land was left out of the State of New Mexico; on the other hand, if this Court decrees that the United States and Texas, since 1850, recognized that accretion did not apply, this would be binding on private land owners. We respectfully urge that, regardless of the result on the fixing of the boundary in this suit, this Court, when it is clearly and positively shown that the statement that Texas and the United States, since 1850, recognized the boundary as one not affected by accretion, is in fact untrue, should withdraw such statement from its opinion.

We take it that the holding of the Supreme Court upon the question of accretions is based principally upon a mistaken belief that the United States and Texas had recognized the position of the river in 1850 as the boundary at all times between 1850 and 1912, and that belief is the real basis of the decision of the Court. But this Court also calls attention to the fact that the Constitution adopted by the State of New Mexico contained the declaration that the boundary of New Mexico should run along the main channel of the Rio Grande "as it existed on the 9th day of September one thousand eight hundred and fifty."

Of course, if the United States had in fact recognized for more than half a century that the boundary between Texas and New Mexico was one not governed by the ordinary rules of accretion and avulsion, the adoption of this constitution by New Mexico would

have indicated a confirmation of such practice. On the other hand, if we are correct in saying that both the United States and Texas had, since 1850 and up to 1912, recognized the application of the doctrines of accretion and avulsion, then we say that the Constitution of New Mexico, when rightly understood, can have had no effect upon the boundary between New Mexico and Texas.

The Enabling Act, providing for the organization of the State of New Mexico, (36 Stat. 557 c. 310), by its terms expressly provided and contemplated the organization of the "Territory of New Mexico" into the "State of New Mexico". It provided for the organization of a State government as a substitute for the territorial government, and plainly contemplated that the State of New Mexico should be organized with the same boundaries formerly occupied by the Territory of New Mexico.

After New Mexico had tentatively adopted its proposed constitution, with the boundary provision referred to in this Court's opinion, the Congress of the United States, in a joint resolution, (36 Stat. 1454), re-affirmed the boundary line between Texas and the Territory of New Mexico in the following terms:

> "That any provision of this proposed constitution that in any way tends to annul or change the boundary line between the State of Texas and the Territory or State of New Mexico shall be of no force or effect, but shall be construed as not in any way to change, affect or alter the said boundary lines known as the Clark Lines * * * "

This resolution of Congress shows a clear intention to prevent any change in the boundary between the State of New Mexico and the State of Texas.

In the joint resolution to admit the Territory of New Mexico, in Section 2 thereof, it was expressly provided:

"The admission of New Mexico shall be subject to the terms and conditions of a joint resolution, approved February 16, 1911 and entitled 'Joint Resolution Re-Affirming the Boundary Line Between Texas and the Territory of New Mexico.'"

Even if it had been the intention of Congress and of the Territory of New Mexico to change the boundary then existing between New Mexico and Texas, this could not have been done by any Act of Congress or any Act of the Territory of New Mexico, without the agreement of the State of Texas.

Louisiana v. Mississippi, 50 Law Ed. 926;
Washington v. Oregon, 53 Law Ed. 118.

Texas certainly did not agree to any such change, and no such change was in fact contemplated, either by the Congress of the United States or by the Territory of New Mexico.

If merely by the Constitution of New Mexico a change in boundary between New Mexico and Texas was wrought, then lands which up to that time had been rightfully patented by the United States as a part of the Territory of New Mexico, would by virtue of said constitution be placed in Texas, where the New Mexico title would be of no avail. Similarly, lands which prior to the adoption of the New Mexico constitution were unquestionably in Texas, and which had been rightfully granted by Texas to Texas property owners, would, by the mere adoption of the constitution by New Mexico and the conferring of statehood by Congress, be taken out of the State of Texas, without the consent of Texas, and placed in New Mexico, where the grant from Texas would not be recognized.

If it should be held that the adoption of the Constitution changed the boundaries of the State of New Mexico and gave it a different boundary than that formerly belonging to the Territory of New

Mexico, certainly in any event this could not change the boundaries of the State of Texas, and if some land formerly in the Territory of New Mexico was excluded from the State of New Mexico, such exclusion could not have the effect of placing such excluded land within the boundaries of the State of Texas, without the consent of that State, and of course no consent upon the part of that State was obtained.

In this case the Supreme Court has dismissed the bill filed by the State of New Mexico, and has rendered judgment for Texas on its cross bill. Texas must recover upon the strength of its own title, and if the Constitution of New Mexico did not have the effect to change the boundaries of the State of Texas, then clearly Texas would not be entitled to judgment for lands previously in the Territory of New Mexico, and never a part of the State of Texas.

We come at last to the question of pleadings. This Honorable Court has placed very little stress upon pleadings, but we think proper to refer to them, as they have been mentioned in the Court's opinion.

The Joint Resolution admitting New Mexico as a State was passed in 1911. The Complaint of New Mexico in this suit was filed in 1913. The boundary of the State of New Mexico had been fixed, therefore, by law, approximately two years before this suit was filed.

In its Bill of Complaint the State of New Mexico specifically pleaded the Act of Congress of September 9, 1850, entitled "An Act Proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory Claimed by Her Exterior to Said Boundaries and of all Her Claims upon the United States, and to Establish a Territorial Government for New Mexico", and said resolution was attached to the Bill of Complaint as Exhibit A.

New Mexico also expressly pleaded the Proclamation of the President of the United States fixing the boundary between the Territory of New Mexico and the State of Texas, attaching a copy of such Proclamation of the President to the Bill of Complaint as Exhibit B. And the State of New Mexico expressly pleaded the acceptance of such propositions by the State of Texas. The State of New Mexico also expressly pleaded the Enabling Act passed by Congress for the formation of a State Government by the people of New Mexico, showing that the Enabling Act provided for the organization of the Territory of New Mexico into a State. And the State of New Mexico also pleaded the Joint Resolution of Congress re-affirming the boundary line between Texas and the Territory of New Mexico, and alleged that said joint resolution re-affirmed the boundary of the Territory of New Mexico, and expressly pleaded that said resolution provided that no change should take place in said boundary by virtue of the formation of the State of New Mexico, or by virtue of anything contained in the Constitution of that State.

It is true that the State of New Mexico, in its pleadings, alleged that the Rio Grande was by virtue of the Act of Congress of 1850, and the above agreement with Texas, made the boundary between New Mexico and Texas, and that the channel of the Rio Grande as it existed at the time of said resolution became at that time the boundary between the Territory of New Mexico and the State of Texas. It is also true that New Mexico alleged "that said boundary has remained unchanged to the present time". It is also true that in the prayer for relief the State of New Mexico asked that the boundary be fixed in the position occupied by the Rio Grande in the year 1850, but the State of New Mexico also prayed for "such further and other relief as the nature of the case may require and as to the Court shall seem meet." (See pages 2 to 5, Volume 1, Transcript of Record).

The allegation "that said boundary has remained unchanged

to the present time" is either an allegation as to matters of fact or a mere conclusion on the part of the pleader. The State of New Mexico having pleaded specifically the various resolutions of Congress and the various agreements made between Congress and the State of Texas, fixing the boundary, it was for the Court to determine the legal effect of such resolutions and agreements, and the legal effect could not be changed by any pleading of conclusions on the part of the State of New Mexico. Of course, legal conclusions are not proper matters to be pleaded.

The pleading by the State of New Mexico to the effect that the boundary was the same in 1913 as it was in 1850, and that such boundary was in the position occupied by the river in 1850,—when such pleading is given its proper construction,— could mean only one thing, in the light of the fact that the law was as pleaded by the State of New Mexico. It would mean that the Rio Grande remained in the same position which it occupied in 1850 up until such time as it changed from that position, and that at the time it made such change it changed by avulsion. In other words, conceding that the law was as pleaded by the State of New Mexico, and as the law is with reference to such matters, the ordinary doctrines of accretion and avulsion apply to such boundary as a matter of law, and it was not necessary to plead the rules of law applicable to such river boundaries; and therefore, in order to establish the fact that the boundary in 1913 was in the same position which was occupied by the Rio Grande in 1850, it would be necessary to establish as a matter of fact that the Rio Grande either remained continuously in the position occupied by it in 1850, or that when it changed from such position at some time subsequent to 1850, it changed by avulsion.

An examination of the evidence introduced by the State of New Mexico sought to establish that in 1850, and prior and subsequent thereto, the Rio Grande was running in the position as shown on the map attached to the Complaint of the State of New Mexico, and such testimony also tended to show that about 1860, while the River was

still occupying substantially the same position that it occupied in 1850, it made a sudden change from the east side of the valley to the west side of the valley. This would necessarily constitute an avulsive change, and would leave the boundary between the Territory or the State of New Mexico and the State of Texas in the position which was occupied by the River at the time of such avulsive change. This position, according to New Mexico testimony, was the same as the position occupied by it in 1850.

There is nothing in the Complaint of the State of New Mexico specifically denying or necessarily denying the application of the ordinary rules of accretion and avulsion on the river boundary.

It is not necessary for a party to allege rules of law. Such rules will be applied by the Court without pleading.

It has never been held necessary to plead the rules of law with reference to accretion and avulsion in a boundary suit. When the State of New Mexico pleaded all of the Acts of Congress and all of the agreements between Congress and the State of Texas, and pleaded the resolutions of Congress in admitting New Mexico as a State, this was all that it was necessary to plead in order to show the application of the ordinary rules of accretion and avulsion. The facts to be developed upon the trial would determine how such rules would affect and locate the actual boundary.

The State of Texas, in its Reply and Cross-Bill, agreed as to the Resolutions and Acts of Congress and the agreements between the United States and Texas applicable to this boundary. All of these Acts and Resolutions showed that this was a boundary subject to the ordinary rules of accretion and avulsion. It is true that Texas also in its Cross-Bill pleaded that the boundary in 1913 was in the position which had been occupied by the Rio Grande in 1850, but there was no allegation to the effect that the ordinary doctrines of accretion and avulsion did not apply. In order to establish the

boundary as pleaded by the State of Texas, it was necessary for the State of Texas to show, under the law applicable to such boundary, that the Rio Grande either remained at all times in the position occupied by it in 1850, or changed from that position by avulsion. The burden was upon the State of Texas to establish such facts, in order to establish the boundary as pleaded by it, and as now found by this Court. This burden the State of Texas failed utterly to discharge. (The pleadings of Texas, as shown on pages 15 to 20, Volume 1, Transcript of Record.)

Even the most technical construction of the pleadings would not justify the Court in holding that by virtue of such pleadings the Court cannot apply the doctrines of accretion and avulsion, which would otherwise be applicable.

But this suit is not a suit between private parties, but a suit between two States representing not only the rights of such States as such, but the rights of all property owners holding titles under such States; and this Court will not in our opinion apply to pleadings in a case of this character technical rules of construction, even if they were such as might possibly be applied in suits between private individuals.

This is true, not only by virtue of the very nature of the proceedings, but is also true for the further reason that, even by a formal agreement, properly executed and approved by the State of New Mexico and the State of Texas, a change in the boundaries of such States could not be made. A change in the boundary of two States must be made not only with the agreement of such States, but also, the United States must be a party to such agreement in order to make it effective.

Certainly if two states can not by formal agreement change their boundaries, the boundaries cannot be changed by the mere form of the pleadings adopted by attorneys employed to represent

such States in court, when under the pleadings, and under the law applicable to such boundaries, it is clearly seen that the actual boundary is not in accordance with the boundary as contended for.

As an illustration, we might suppose that the State of New Mexico had pleaded that the boundary between the State of Texas and the State of New Mexico, within the vicinity in question, was located along the crest of the Franklin Mountains, and that the crest of the Franklin Mountains was correctly shown on the map attached to the petition of the State of New Mexico. We might then suppose that the State of Texas had filed a pleading in which it alleged that New Mexico was correct in saying that the boundary between the two states was along the crest of the Franklin Mountains, but that the crest of the Franklin Mountains was ten miles to the west of the position shown in the map attached to the Complaint of the State of New Mexico. Certainly this Court, upon an examination of the law applicable to such boundary,—a law which this Court will take judicial knowledge of, and which law was actually pleaded by both parties, and which law fixed the Rio Grande as the boundary, and not the Franklin Mountains,—would not do the foolish thing of ascertaining where the crest of the Franklin Mountains was, and then decreeing that such was the boundary between the two states.

In many boundary suits, not only between States, but between individuals, the Court upon final trial fixes the actual boundary neither in the position pleaded by plaintiff nor in the position pleaded by the defendant, but in some other position which the Court upon hearing finds to be the actual true boundary between the lands of such parties.

As we have already pointed out, the decision in this case may affect the rights and titles of many and various individual property owners, who, while in theory they are represented by their States in this litigation, have in fact no control whatsoever over the

form of the pleadings or the nature of the contentions made by the attorneys in this suit before this Court. Most of these individual property owners are wholly unfamiliar with the details of this proceeding, and do not know the actual location of the River of 1850, as contended for by Texas, or as contended for by New Mexico. These property owners will not be advised of how their titles may be affected until the surveyor designated to survey the boundary line actually goes upon the ground and begins to run his line in accordance with the Decree of the Court. Then for the first time, and when it is too late, the individual property owners will see the effect of this decision upon their individual titles.

The pleadings in this case do not require this Court to disregard the laws of accretion and avulsion as applicable to this boundary, to the detriment of private titles to land in this locality and with the result of fixing an incorrect boundary.

This Honorable Court in its Opinion has referred to the fact that the Master found that in the argument before the Master counsel had stated that Texas and persons claiming under Texas had been in possession and were in possession at the time of the hearing before the Master, of the land involved in this dispute. This statement on the part of the Master must be accepted as it was intended. It was merely a general statement to the effect that, in a general sense, Texas claimants were in possession of the land involved in this controversy. It was not intended by the Master or by any of the parties as a statement that Texas was in possession of all land lying east of the 1850 river. No such statement was ever made, either in briefs or in argument, by counsel for New Mexico, and if a statement such as that was made by counsel for the State of Texas, it would be made with a misapprehension of the true facts, and would be in actual conflict with the true facts. The Master merely intended to say that practically all of the land involved in this proceeding was in the possession of Texas claimants, and this possession had reference to the time of the hearing before the Master, rather

than to the time of the filing of the Complaint in this suit. Most of the land at the time of the filing of the Bill was unimproved, and in fact unoccupied, and no testimony in the record will be found to justify any statement that Texas claimants were in possession of all land east of the River of 1850.

As a matter of fact, about the only evidence in the record as to possession of land involved by these present exceptions is with reference to possession of land in the Country Club area, and this land was in the actual possession of New Mexico claimants prior to the time that New Mexico was admitted as a State, and subsequent thereto for some time. The Texas claimants, as a matter of fact, first began to make use of the land in the Country Club area in 1916, three years after this suit was filed, and at the time that they sought to clear this land, in 1916, an injunction was first issued out of a New Mexico court, and the Texas claimants put off the land, and thereafter the temporary injunction was dissolved on *the sole ground that the trespasses alleged were such as could reasonably be compensated for in rents and damages*, the trespassers being shown to be fully solvent. (See exhibits attached to the reply of New Mexico to the motion of Texas to take additional testimony.)

The subsequent clearing of the land and building of improvements was in face of the suit filed by the New Mexico property owner, setting forth his rights and claims, and the improvements made by the Country Club were made under an express indemnity agreement from a wealthy Texas property owner who was interested in having that territory developed, and who was instrumental in having the Country Club make such improvements. (See exhibits attached to the reply of New Mexico to the motion of Texas to take additional testimony.)

## CONCLUSION

We feel confident that the Opinion of this Court, insofar as it applies to the question of accretions, is based primarily upon the mistaken belief of this Court, to the effect that both Texas and the United States, after 1850 and up to 1912, recognized that the doctrines of accretion and avulsion were not applicable to the boundary along this river line. This mistake upon the part of the Court is due solely to the statements contained in the Exceptions of Texas to the Report of the Master, and also to the remarks made by the Attorney General of Texas in the oral argument before this Court, to which oral argument the State of New Mexico had no opportunity to reply. No citation from the record was made or could be made to sustain such finding.

We respectfully submit, in the interests of the individual property owners of both States, as well as in the best interests of the two States themselves, and with a view to a correct establishment of the boundary in this case, that this Court should grant a re-hearing, and upon such re-hearing modify its former decision so as to fix the boundary as claimed by New Mexico in its map attached as an exhibit to its pleading or there in the alternative so as to conform to the Master's Report, by recognizing the application of the doctrines of accretion and avulsion, thus fixing the boundary in accordance with such report.

Respectfully submitted,

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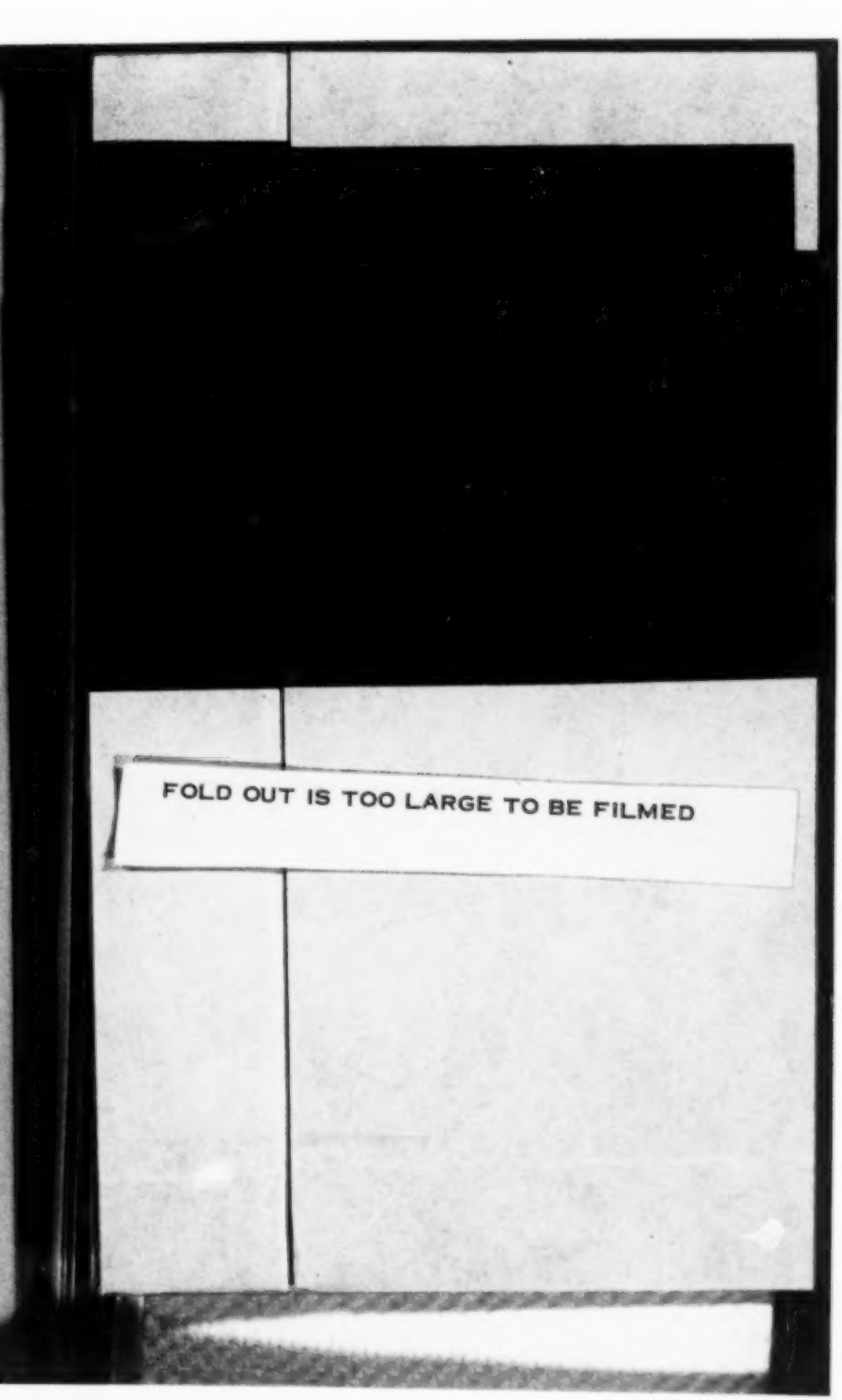
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